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No. 99-1871

In The

Supreme Court of the United States

UNITED STATES DEPARTMENT
OF THE INTERIOR AND UNITED STATES
BUREAU OF INDIAN AFFAIRS,

Petitioners,

v.

KLAMATH WATER USERS
PROTECTIVE ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether seven items of correspondence between (1) certain Indian Tribes located in the Klamath River Basin, and (2) the Department of Interior and the Bureau of Indian Affairs, in connection with ongoing administrative and adjudicative proceedings involving water rights and water allocations affecting the Tribes' interests, are "inter-agency or intra-agency" documents that are exempt from disclosure under exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5).

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

All of the parties to this proceeding are correctly identified in the caption. Respondent Klamath Water Users Protective Association is a not-for-profit corporation, and has no related corporate entities.

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RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Klamath Water Users Protective Association (the "Association") respectfully submits this brief in opposition to the petition for writ of certiorari filed in this case by Petitioners United States Department of Interior ("Interior") and United States Bureau of Indian Affairs ("BIA") (collectively referred to herein as the "United States").

OPINIONS AND JUDGMENTS BELOW

The opinion of the court of appeals (Petitioners' Appendix ("Pet. App.") 1a-30a) is reported at 189 F.3d 1034 (9th Cir. 1999). The order of the court of appeals denying Petitioners' petition for rehearing with suggestion for rehearing en banc is unreported (Pet. App. 72a-73a), and was entered on December 22, 1999.

JURISDICTIONAL STATEMENT

The jurisdiction in the district over claims against the United States was invoked pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 702, and 28 U.S.C. §§ 1331, 1361, 2201-2202. The jurisdiction in the court of appeals for the Ninth Circuit was invoked pursuant to 28 U.S.C. § 1291. On June 8, 2000, the Chief Clerk of this Court extended the time for filing this brief in opposition to and including July 21, 2000. This Court's jurisdiction is invoked by the United States pursuant to 28 U.S.C. § 1254(1).

STATEMENT

The United States' statement of the case in its petition is incomplete in several respects, and misleading in others. As a result, pertinent aspects of the case that the United States has either omitted or mischaracterized are discussed below.

The Association is a non-profit corporation formed under section 501(c)(5) of the Internal Revenue Code. 26 U.S.C. § 501(c)(5). Most of the members of the Association have contracts with the U.S. Bureau of Reclamation ("Reclamation") providing for the delivery of water through Klamath Irrigation Project facilities. Of these, most are public agencies, primarily irrigation districts, that use water from the Upper Klamath Lake and Klamath River. The Association provides information and representation for its members on matters in which they have a common interest, including water resources, agriculture, and other resources issues in or affecting the Klamath River Basin in northern California and southern Oregon.

The Association brought this action pursuant to FOIA, 5 U.S.C. § 552 *et seq.*, to obtain certain documents withheld by the United States that are related to certain contentious disputes regarding water resources in the Klamath River Basin. These disputes include: (i) Reclamation's development of the so-called Klamath Project Operations Plan ("KPOP"), a long-term plan to operate the Klamath Project facilities according to the purported legal obligations of Interior; and (ii) the ongoing Klamath Basin Water Rights Adjudication pending before the State

of Oregon. *See United States v. Oregon*, 44 F.3d 758, 764 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995).

Several Native American Tribes, including the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, and the Yurok Tribe (collectively, "Klamath Basin Tribes" or "Tribes"), are involved in these two disputes in order to protect their asserted natural resources claims related to the Klamath River and/or Klamath Lake. The approaches or management advocated by the Tribes within these disputes is often detrimental to Association members, since the Tribes' demands would make water unavailable for irrigation. The Klamath Basin Tribes have consistently sought to influence Interior agencies to take water away from Association members and to allocate more water to instream use for the purported benefit of the Tribes. Excerpts of Record ("ER") 273, 290, 322. The Tribes have threatened litigation against the United States, and have exerted an enormous amount of argument and political pressure to force this reallocation of water. ER 276, 290, 323-332, 372-374, 378-380. The Tribes are interested parties, and capable advocates; they are *not* neutral advisers or consultants to the United States. In fact, the Tribes and Interior have each hired their own consultants to assist them in representing their individual interests in the Klamath Basin, and the Tribes, the Association, and the public at large were specifically excluded from the ultimate agency deliberations at issue. ER 273-276, 372-374.

This case arose after the Association submitted several FOIA requests to Interior agencies, including the BIA, for documents provided to or received from the Klamath Basin Tribes pertaining to water resources issues in the Klamath River Basin. These requests were made, in

part, to discern what information was being exchanged during Reclamation's preparation of the draft KPOP. *See* Pet. App. 3a. In addition, the Association's FOIA requests were made only after Interior had freely provided to the Tribes, pursuant to the Tribes' own earlier FOIA requests, copies of communications between the Association and its members, and the United States regarding the KPOP and the water rights adjudication. ER 283, 365-371.

In responding to the Association's FOIA requests, the BIA released some documents, but refused to disclose approximately forty (40) responsive documents on the grounds that they were exempt from disclosure pursuant to the FOIA exemption 5. ER 23-30, 64-73. Shortly after the Association filed its complaint in district court, the BIA subsequently released several of the initially withheld documents. These included documents that were presented by the Klamath Basin Tribes at a *public meeting*, which the Association was invited to attend. ER 37-38, 486-494. They also included a letter from a tribal attorney to a tribal member. ER 487, 497-499. Under even the most narrow reading of the FOIA, these documents were not exempt from disclosure. The Association should not, nor should any other member of the public, be required to file a federal district court lawsuit in order to obtain documents that are so obviously subject to release. The fact that BIA withheld these documents initially is indicative of the United States' consistent failure in this case to comply with the broad disclosure policies of FOIA.

Subsequently, the BIA released additional documents that had been initially withheld, and the Association withdrew its request as to certain other withheld documents that were either (i) provided by another Interior

agency (i.e., Reclamation), or (ii) were eventually described in enough detail in the United States' *Vaughn* index (*see Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)) and declarations, to satisfy the Association that the documents were likely exempt.[1]

The seven documents remaining in dispute, consisting of a total of 31 pages, are identified as correspondence between (i) the BIA and/or Interior personnel, and (ii) Klamath Basin Tribes representatives or organizations. These documents are described in the United States' *Vaughn* index as (i) memoranda provided by the Tribes to Interior for use in the development of the KPOP, (ii) a memorandum from Interior to the Tribes concerning the government's trust obligations in developing the KPOP, and (iii) memoranda from the Tribes to Interior addressing claims in the water rights adjudication. *See* Pet. App. 6a-7a; *see also* Index to Documents Remaining in Dispute,

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[1] In this regard, the United States' *Vaughn* index confirmed, for the first time, that 13 of the initially withheld documents were notes prepared by BIA personnel. ER 123-132. These notes evidence the Klamath Basin Tribes' continuing attempts to influence the Interior's decisions regarding Klamath Project operations. The descriptions of these documents exacerbate the Association's concern that BIA employees may, in fact, have been communicating with the Tribes' attorneys with respect to contents of the draft KPOP under internal review in Interior. The Association believes this would be a significant act of bad faith, as Interior agencies repeatedly gave assurances that neither Tribes nor other interested parties would have access to the internal draft. However, the Association conceded that the United States' *Vaughn* index and declarations justified withholding these particular documents under the FOIA, exemption 5.

attached hereto as Exhibit 1a to Appendix to Brief in Opposition ("Opp. App.").[2]

The FOIA sets forth only nine specifically enumerated categories of records that are exempt from FOIA's disclosure requirements. 5 U.S.C. § 552(b)(1)-(9). As the court of appeals emphasized,

> [w]hen a [FOIA] request is made, an agency may withhold a document only if it falls within one of the nine statutory exemptions in § 552(b), and these exemptions " 'must be narrowly construed' in light of the FOIA's 'dominant objective' of 'disclosure, not secrecy.' " [Citing] *Church of Scientology v. Department of the Army*, 611 F.2d 738, 741 (9th Cir. 1980), quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Pet. App. 6a.

This case, of course, involves exemption 5 of the FOIA, which shields from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The United States continues to withhold these seven documents, and all portions of them, on the alleged grounds that the Klamath Basin Tribes are essentially "consultants" of Interior due to their trust relationship, and that the correspondence between the United States and the Tribes, therefore, meet the so-called "functional test" of

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[2] This index was attached as an exhibit to the Association's reply brief on the merits in the Ninth Circuit, without objection by the United States.

"inter/intra-agency" communications. *See Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). As a result, the United States continues to assert that the documents are exempt from disclosure pursuant to the deliberative process privilege and/or attorney work-product privilege under the FOIA exemption 5. *See* 5 U.S.C. § 552(b)(5).

The court of appeals rejected these arguments based upon the unique and limited factual circumstances of this case. At the outset, the court of appeals declined to apply the "functional test" expansion of FOIA exemption 5, finding that this case is quite distinguishable from those where the "functional test" has been applied. In this regard, the court of appeals emphasized that the Tribes have asserted conflicting claims against the Association, and that the Tribes have a direct interest in the subject matter of the consultations – e.g., Interior's decisions with respect to the KPOP and the adjudication. Pet. App. 8a. On this latter point, the court of appeals emphasized that "consultation with the tribes is not similar to 'the advice from staff assistants and exchange of ideas among agency personnel' that forms the object of exemption five . . . " Pet. App. 9a.

The court of appeals also emphasized that the United States exercises fiduciary obligations to the Tribes in the context of governing statutes, and that "while it must act in the interests of the tribes, it may not afford them greater rights than they would have under the regulatory scheme. *See Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308 (9th Cir. 1997)." Pet. App. 10a. In addition to the requirement that FOIA's exemptions must be narrowly construed, the court of

appeals attached significance to the executive branch's own written policies requiring that for the types of consultations in this case, "[a]ll such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." Pet. App. 10a, *see also* ER 250-253.

Finally, the United States' petition neglects to state that, excepting Judge Hawkins, the dissenting judge in the court of appeals, not a single judge of the Ninth Circuit court of appeals requested a vote on the United States' petition for rehearing en banc. *See* Pet. App. 72a-73a.

REASONS FOR DENYING THE WRIT

There is no circuit court conflict concerning the applicability of the FOIA exemption 5 to communications between tribal interests and federal agencies. Moreover, all circuit courts that have addressed the issue recognize that when an adversarial, non-neutral relationship exists, the FOIA exemption 5 does not apply. The United States has not established an adequate basis to justify the exercise of this Court's discretionary jurisdiction, and plenary review by this Court is not warranted.

Contrary to the United States' alarmist assertions about the potential far-reaching effects of the court of appeals decision, it is the United States' own petition that requests that this Court drastically depart from controlling case law and executive branch policy, and expand the

scope of the FOIA exemption 5. The United States essentially requests this Court to legislate a whole new exemption to the FOIA based upon the trust relationship between the Klamath Basin Tribes and the United States. Taking the United States' arguments to their logical conclusion would essentially broaden the FOIA's exemption 5 to include virtually any communications between interested beneficiaries in federal programs and the federal agencies which oversee such programs. This significant expansion of the FOIA exemption 5 is directly contrary to the mandates that FOIA's exemptions be narrowly construed. Any such expansion must be left to Congress.

Finally, the United States' assertions are fatally flawed in that they rest upon the faulty premise that some sort of trustee-beneficiary privilege exists within the purview of the FOIA exemption 5. For the foregoing reasons and as detailed below, the United States' petition for writ of certiorari should be denied.

A. There Is No Conflict Between The Circuit Courts, And All Courts That Have Addressed The Issue Agree That Under The Unique and Limited Factual Circumstances Of This Case, The FOIA Exemption 5 Would Not Apply.

FOIA exemption 5's threshold test requires that the documents be "inter-agency or intra-agency" correspondence. *See* 5 U.S.C. § 552(b)(5); *see also County of Madison, N.Y. v. United States Dept. of Justice*, 641 F.2d 1036, 1043 (1st Cir. 1981) ("Once a communication is found to meet the intra- or inter-agency criterion, it must then be examined to see if any privilege shields it from

disclosure . . . "). It is undisputed that none of these withheld documents are literally "inter-agency or intra-agency" documents. Instead, six of the seven withheld documents are correspondence from the Tribes (or their representatives) to federal personnel. The remaining document is a memorandum from a BIA staff person to other BIA staff persons and to private attorneys hired by the Klamath Basin Tribes. *See* Opp. App. 1a. Nevertheless, the United States implores that the "inter/intra-agency" threshold test was met due to the "consultative relationship" between the United States and the Klamath Basin Tribes based upon their trustee-beneficiary relationship, and the actual role of the documents in the BIA's and Interior's deliberations.

The court of appeals flatly rejected this argument that the Tribes were acting in the role of consultants with respect to the disputed documents, and therefore, satisfied the so-called "functional test" articulated in *Formaldehyde Inst. v. Department of Health and Human Services*, 889 F.2d 1118 (D.C. Cir. 1989), and its related line of cases. ER 632. This "functional test" provides that under certain circumstances, the communications between agencies and their consultants are exempt from disclosure pursuant to the deliberative process privilege. *Formaldehyde Inst.*, 889 F.2d at 1122. The *Formaldehyde* case explains the functional test as follows:

> [E]fficient government operation requires open discussions among all government policymakers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects. Congress apparently did not intend "inter-agency" and "intra-agency" to be rigidly exclusive terms, but rather to include any *agency document* that is part of the deliberative process . . . [c]ourts have repeatedly found that a privilege attaches to reports of outsiders *commissioned* by an agency to perform agency work, when such reports would be protected if compiled within the agency itself. Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider.

Id. at 1122. (Citations and quotations omitted, emphasis added.)

The foregoing explanation demonstrates that the "functional test" is a creature of case law, and is not expressly set forth in the statutory language of the FOIA exemption 5. As a result, the parameters of the "functional test" should be narrowly construed. *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d, 1082, 1085 (9th Cir. 1997); *see also County of Madison*, 641 F.2d at 1040, *citing Vaughn v. Rosen*, 484 F.2d at 823 and at n.11 ("[C]ourts have repeatedly stated that uncertainties in the FOIA's language are to be construed in favor of disclosure and that its exemptions are to be read narrowly."). In this regard, none of the cases in which the functional test was satisfied involved communications from "consultants" who had a direct and personal interest in the outcome of the agency decision for which their "advice" was given, and none of these consultants had

adversarial relationships with the involved agencies.[3] This case, in contrast, is replete with evidence that the Tribes are non-neutral, interested parties who believe that they will significantly benefit from favorable decisions by Interior agencies regarding Klamath Project operations. The Tribes, moreover, are past, present, and potential future adversaries of Interior with respect to the decisions being made in the KPOP and the adjudication. The court of appeals, therefore, did not err in narrowly construing the so-called "functional test."

The same "functional test" arguments advanced here by the United States were similarly rejected in *County of Madison*, 641 F.2d 1036, which is closely on point. In *County of Madison*, the court considered whether Department of Justice ("DOJ") settlement documents in an Indian claims case brought by the Oneida Indian Nation were exempt from disclosure under FOIA. The withheld

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[3] *See, e.g., Formaldehyde Institute*, 889 F.2d 1118 (review letter submitted by scholarly journal's review panel to Dept. of Health & Human Services); *Public Citizen, Inc. v. Dept. of Justice*, 111 F.3d 168, 177 (D.C. Cir. 1997) (communications between former President Bush and National Archives and Records Administration); *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (report prepared by consultant retained by the Office of Federal Contract Compliance Programs); *Ryan v. Dept. of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (non-factual portions of congressional responses to Justice Department questionnaires); *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973) (report prepared by consultants retained by National Endowment for the Humanities); and *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (report prepared by panel of experts convened by Office of Science and Technology).

documents were correspondence between the Oneidas' attorneys and the DOJ regarding settlement of the Oneidas' Court of Claims case. Third parties, who were defendants in a similar district court suit brought by the Oneidas, sought disclosure of these settlement correspondence documents. *County of Madison* at 1038-1039.

There, the United States acknowledged that the withheld documents were " 'not literally inter- or intra-agency letters.' " *Id.* at 1039. Nonetheless, the United States argued, as it is now, that the court should rely on cases that protect communications from outside consultants called upon to assist in internal decision-making, as precedent for reading exemption 5 broadly enough to encompass the withheld documents. *Id.* at 1040. The First Circuit rejected this argument. The court could "perceive of no way . . . to describe the Oneidas' lawyers as 'intra-agency' – that is to say 'within the Department of Justice' – that does not simply omit the term 'intra-agency' from the Act in pursuit of policy ends." *Id.* The court explained as follows:

> [T]he Oneidas approached the government with their own interest in mind. While they came to parley, they were past and potential adversaries, not coopted colleagues. . . . [W]e believe that expanding exemption five to include self-seeking petitioners "within" agencies would do more violence to statutory language than Congress' direction permits.

Id. at 1040-1041.

The United States also argued in *County of Madison* that the documents were protected by exemption 5 due to

the " 'unique fiduciary relationship between the government and the Indians [which] . . . requires that communications between the two remain confidential so as to maintain 'the trust and confidence necessary to sustain the government's relationship with the Oneidas, and Indians in general.' " *Id.* at 1042 (citation omitted). The First Circuit properly rejected this argument, reasoning as follows:

> We might agree with the sense of this position. We confess to feeling a sense of indecent exposure in countenancing a third party adversary obtaining confidential exchanges between the Indians' attorneys and the government. *But we cannot agree that this means that Indians are "within" the Department of Justice.*

Id. (emphasis added).

In the instant case, the facts favoring disclosure are significantly more compelling and are in accord with the First Circuit's *County of Madison* decision. The Klamath Basin Tribes approached the government with their own interests in mind. They aggressively advocate government action – the reallocation of water – which they assert would benefit them, and which most surely would be injurious to agricultural communities. The Tribes pursue their ends with every available strategy. They make political overtures to the Office of the Secretary. ER 385. They threaten lawsuits. ER 276, 323, 324-332, 372-374, 378-380. They prepare technical reports to support their advocacy. ER 345-364, 372-374. They demand that irrigation diversions be shut off. ER 322-323, 380.

The district court in this case distinguished *County of Madison* because the Klamath Basin Tribes "are not in

current litigation with the government," and "[m]ost of the documents were provided to the government at their requests." Pet. App. 59a. The Tribes, however, expressly threatened to sue the Department of the Interior before, during, and after the KPOP process, and the period covered by the FOIA requests in issue. Those threats include threats in September of 1994, December of 1994, February and March of 1996, and September of 1996. ER 276, 322, 324-332, 378-380. Just as in *County of Madison*, therefore, the Klamath Basin Tribes were, and remain, potential adversaries to Interior. By ordering the disclosure of actual *settlement* communications, which should be the least subject to disclosure, *County of Madison* emphasized the importance of adhering to the plain language of the FOIA, and of construing the FOIA exemption 5 narrowly.

The United States also cites *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997) to support its arguments. Petition for Writ of Certiorari (Pet.) at 21-22. This continued reliance on the *Public Citizen* case is misplaced. In *Public Citizen*, a public interest group sued the National Archives and Records Administration ("Archives") seeking correspondence between the Archives and former Presidents Ronald Reagan and George Bush relating to access to their respective presidential records. *Id.* at 169. The Archives invoked the FOIA exemption 5 and the deliberative process privilege, arguing that because the communications took place as part of consultations required under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 (1994), the records met the "functional test" rule for external consultant communications created for the purpose of aiding the agency's deliberative process. *Public Citizen* at 169. The plaintiff argued

that due to other aspects of the relationship between the President and the Archives, it cannot be consultative for the purposes of the FOIA exemption 5. In particular, plaintiffs argued that the former President "has a distinct and independent interest that makes him an adversary." *Id.* at 171. The plaintiff, however, offered no objective evidence of an adversarial relationship, and the circuit court explained as follows:

> At some point, of course, features of the other relationships (above all, a possible future adversary one) might come to eclipse the consultative relationship, but plaintiff has offered nothing concrete to suggest any movement in that direction here.

Id.

Lacking any concrete evidence of an adversarial relationship, the court found that "the potential for an adversary relationship is not enough to negate one of consultation." *Id.*

Here, in contrast, there is overwhelming evidence of the Tribes' biased, advocacy-based and often adversarial relationship with Interior, and these features have clearly eclipsed any neutral consultative relationship that may otherwise have existed. As a result, the *Public Citizen* case clearly undercuts the United States' argument that the Tribes stand in the role of consultants for the purposes of the FOIA exemption 5. The court of appeals, therefore, quite correctly found that the Klamath Basin Tribes' relationship with Interior and the Association regarding the water rights disputes in the Klamath River Basin preclude the possibility of any truly neutral consultative role that the Tribes may have in the United States' deliberations

pertaining to the KPOP and the state water rights adjudication processes.

The Association acknowledges the significant fiduciary and trust responsibilities that the United States owes to Tribes. However, there is nothing in the FOIA, the FOIA case law, or the FOIA's legislative history which broadly exempts the United States from complying with the FOIA when carrying out these duties. Likewise, of course, nothing exempts the United States from complying with the FOIA when the United States fulfills its significant obligations toward its Klamath Project contractors. In this regard, in response to the FOIA requests from the Klamath Basin Tribes, Interior has disclosed correspondence between the United States and the Association's members regarding the KPOP and the Klamath River Basin adjudication. ER 283, 365-371. This one-way street created by Interior indicates a failure to acknowledge Interior's dual obligations toward the Klamath Basin Tribes and its Klamath Project contractors.[4]

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[4] *See Nevada v. United States*, 463 U.S. 110, 128 (1983), *reh'g denied*, 464 U.S. 875 (1983), wherein this described the United States' dual obligations toward its Indian interests and its reclamation project contractors, aptly stating as follows:

> Today, . . . it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other

In summary, the court of appeals correctly decided that, under the unique facts and circumstances of this case, the disputed documents "fail to meet the threshold inter-agency/intra-agency test," under the FOIA exemption 5. *See* Pet. App. 10a.

B. There Is No Trustee-Beneficiary Privilege Recognized Within The Purview Of The FOIA Exemption 5.

The United States' assertions are fatally flawed because they rest upon the faulty premise that some sort of trustee-beneficiary privilege exists within the purview of the FOIA exemption 5. The United States asserts that "under the court's ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under FOIA, without regard to the applicability of any traditional discovery privilege." Pet. at 24. This statement suggests the existence of a recognized trustee-beneficiary privilege in the discovery context. No specific trustee-beneficiary privilege exists at common law,[5] however, and under the Federal Rules of

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interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

[5] There is, of course, the unrelated *fiduciary exception* to the attorney-client privilege, which bars trustees from invoking the attorney-client privilege to shield disclosures to beneficiaries.

Evidence Rule 501, federal courts have rarely expanded privileges beyond established privileged relationships such as attorney-client and husband-wife.[6] The courts, moreover, will construe established privileges narrowly, generally leaving Congress to decide whether to establish new privileges. *University of Pa. v. EEOC*, 493 U.S. 182, 186-187 (1990).

Article V of the Federal Rules of Evidence ("Rules") sets forth the statutory law of privileges in federal court. This article contains only one general rule stating that privileges shall be "governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed.

See, e.g., United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999), *citing Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (1976).

[6] *See, e.g., Trammel v. United States*, 445 U.S. 40, 53 (1980) (narrowing husband-wife privilege and holding that witness spouse may testify over the objections of the other spouse); *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (declining to recognize a privilege for academic peer review proceedings); *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-819 (1984) (rejecting an accountant work-product privilege); *United States v. Gillock*, 445 U.S. 360, 367-368 (1980) (refusing to recognize a privilege for state legislators in federal court); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (rejecting a privilege for confidential communications between the President and the President's high-level advisors); *Couch v. United States*, 409 U.S. 322, 335 (1973) (rejecting an accountant-client testimonial privilege); *United States v. Schoenheinz*, 548 F.2d 1389, 1390 (9th Cir. 1977) (declining to recognize an employer-stenographer privilege); *In re Grand Jury Impaneled on January 21, 1975*, 541 F.2d 373, 382 (3d Cir. 1976) (declining to recognize a required-reports privilege); *In Re Erato*, 2 F.3d 11 (2d Cir. 1993) (declining to recognize parent-child privilege to bar testimony).

R. Evid. 501. The Rules, as originally proposed, included nine specifically defined privileges, and a provision that the federal courts would allow no other privileges except by an Act of Congress. House Comm. of Judiciary, Fed. Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess. at 8 (1973); 1974 U.S.C.C.A.N. 7075, 7082. Those nine enumerated privileges were as follows: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer. *Id.* Eventually Congress deleted the specific privileges from the draft Rules in favor of the more general rule. This was done in part to defer to state privilege law in diversity cases. *Id. See also* Fed. R. Evid. 501 (" . . . [I]n civil actions and proceedings . . . to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.")

The proposed Rules serve as a useful guide in determining the existence and scope of federal law on evidentiary privileges. *See In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990). A trustee-beneficiary privilege was not included in the nine enumerated privileges. The proposed Rules, moreover, stated that no other privileges should apply unless created by Congress. H.R. Rep. No. 650, 93d Cong., 1st Sess. at 8; 1974 U.S.C.C.A.N. 7075, 7082. The absence of a trustee-beneficiary privilege in the proposed Rules, and the overarching policy disfavoring the creation of new privileges strongly weigh against establishing a trustee-beneficiary privilege in this case, which is essentially what the United States has requested this Court to do.

Since the enactment of Rule 501, this Court has generally declined to expand a privilege unless it is statutorily created, or within established common law. In *University of Pa. v. EEOC*, 493 U.S. 182, a university refused to disclose several tenure-file documents requested by the Equal Employment Opportunity Commission, even after the Commission issued a subpoena. *Id.* at 189. The Commission needed the documents to determine the merits of a sexual discrimination charge. The university argued that a qualified privilege for confidential peer-reviewed material should apply for policy reasons and First Amendment principles of academic freedom. *Id.* at 186-187. This Court refused to create and apply an evidentiary privilege in that case. This Court reasoned that to adopt a new privilege, a sufficiently important interest in nondisclosure must outweigh the need for the probative evidence. *Id.* at 189, *citing Trammel v. United States*, 445 U.S. 40, 51 (1980). This Court reiterated its long-standing view that the policy favoring open discovery requires courts to strictly construe privileges. *University of Pa.*, 493 U.S. 189. "[A]lthough Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis . . . we are disinclined to exercise this authority expansively." *Id.* (citations omitted).

This Court has extended privileges in certain limited circumstances under the flexibility provision of Rule 501, but relied on historic precedent in doing so. The Court has held that grand and petit jury proceedings were privileged based on 17th century law incorporated into federal law and codified in the Federal Rules of Civil

Procedure. *University of Pa.*, 493 U.S. at 195, *citing Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979) and *Clark v. United States*, 289 U.S. 1, 13 (1933). Based upon constitutional foundations, the Court granted a qualified privilege for certain presidential communications in *United States v. Nixon*, 418 U.S. 683 (1973). Lastly, the Court extended the psychotherapist-patient privilege to include a patient's communications with a social worker. *Jaffee v. Redmond*, 518 U.S. 1 (1996). Like the other limited exceptions, historic and state statutory authority supported the decision in *Jaffe*, given that all 50 states had enacted some form of that privilege. *Id.* at 12. Moreover, the privilege was included in the original enumerated federal rules submitted by the Advisory Committee. *Id.* at 14. This provided sufficient "reason" and "experience" to extend the privilege. *Id.* at 13.

In contrast to the *Jaffe* case, where courts are unable to find the necessary historical or statutory basis to adopt expanded privileges, they typically decline to do so. In *In re Grand Jury*, 103 F.3d 1140, 1150 (3d Cir. 1997), the court acknowledged that it had the authority to recognize a new parent-child privilege, but thought this recognition should best come from Congress. *Id.* at 1157. The parent has a fiduciary duty to the child; however, unlike the therapist-patient relationship, it lacked the historical antecedents to judicially establish a privilege. *Id.* at 1152. In addition, the majority of state courts had rejected the idea. *Id.* at 1151. This proposed parent-child privilege, moreover, was not in the original proposed Rules. *Id.*

In the instant case, the United States has essentially proposed the creation of a trustee-beneficiary privilege to include communications between tribes and government

agencies. (Of course, the United States never raised this issue below in precisely this context.) This proposed privilege, however, is without precedent or foundation. A trustee-beneficiary privilege (or more specifically, a government-tribal privilege) is not mentioned in the proposed Rules, nor extended in any case law, either federal or state. The need for this privilege, moreover, lacks the kind of "transcendent importance" necessary to outweigh the policy favoring discovery. In any event, the scope of such a privilege would be difficult to define and unwieldy in light of all the other responsibilities of the government.

Based on the foregoing, this Court should deny the United States' apparent attempt to create a newly recognized trustee-beneficiary privilege.

CONCLUSION

The United States' alarmist assertions regarding the far-reaching effects of the court of appeals decision are without any real merit. Under any circumstances, the United States is always free to request Congress to create a whole new exemption under the FOIA to protect non-neutral, advocacy-based correspondence between tribal interests and Interior agencies.

Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: July 21, 2000.

Respectfully submitted,

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APPENDIX A

INDEX TO DOCUMENTS REMAINING IN DISPUTE

DOCUMENT NUMBER	DATE	FROM	TO	DEFENDANTS' VAUGHN INDEX DESCRIPTION
3/96-168 (7 pages)	1/19/96	Klamath Tribes Department of Natural Resources	Cathy Wilson (BIA); also sent to Office of the Solicitor, Division of Indian Affairs	Seven page position paper discussing legal theories concerning the water rights of the federally recognized Indian tribes of the Klamath Basin. **(ER 132-133.)**
6/96-168 (1 page)	1/24/96	Cathy Wilson (BIA)	Tom Strekal (BIA), Doug Tedrick (BIA), Richard Cross (atty. for Yurok Tribe), and Bud Ullman (atty. for Klamath Tribes)	One page memorandum which contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. Specifically, the memorandum considers proposing language as guidance regarding the trust responsibility. **(ER 133-134.)**
10/96-168 (5 pages)	2/8/96	Bud Ullman (atty. for Klamath Tribes)	Tom Strekal (BIA)	Five page position paper with fax transmittal sheet. On 12/3/96, the Dept. released the fax transmittal sheet accompanying this documents. The paper expresses views concerning trust resources in light of the Fish and Wildlife Service's proposal regarding listed species and the resulting implications on lake mgmt. **(ER 134-135.)**
16/96-201 (3 pages)	5/23/96	Bud Ullman (atty. for Klamath Tribes)	Lynn Peterson (Regional Solicitor)	Three page letter discussing the Klamath Basin Adjudication. This letter concerns the water rights claims being prepared on behalf of the Klamath Tribes. **(ER 140.)**
20/96-201 (1 page)	6/18/96	Jeff Mitchell (Klamath Tribes)	Stan Speaks (BIA)	One page letter with attachment. Letter references the attachment and highlights the issues therein. Attachment is the three page 5/23/96 letter from Bud Ullman to Lynn Peterson discussing the Klamath Basin Adjudication (identified by FOIA document number 16/96-201). See analysis above regarding the rationale for withholding the attachment. **(ER 142.)**
25/96-201 (3 pages)	6/28/96	Bud Ullman (atty. for Klamath Tribes)	Stan Speaks (BIA)	One page letter with two page attachment. Letter references the attachment and highlights the issues therein. Attachment is the Klamath Tribes' resolution regarding the Tribes' water right claims in the Klamath Basin Adjudication. **(ER 142-143.)**
27/96-201 (11 pages)	7/1/96	Jacob Kahn (Klamath Tribes)	Cathy Wilson (BIA)	Two page memorandum, nine pages of graphs, an 1 a fax transmittal sheet. The memo concerns biological factors affecting trust resources. On 12/27/96, the Dept. released the fax transmittal sheet accompanying this document. **(ER 144.)**